IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2006 Session

STATE OF TENNESSEE v. BOBBIE GENE GOTHARD

Direct Appeal from the Criminal Court for Hamilton County
No. 250086 Douglas A. Meyer, Judge

No. E2005-02776-CCA-R3-CD - Filed December 21, 2006

The defendant, Bobbie Gene Gothard, pled guilty to driving under the influence in exchange for a sentence of eleven months, twenty-nine days on probation following service of forty-eight hours in the workhouse. As a condition of his plea, pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(i), the defendant reserved a certified question of law dispositive of the case. The certified question of law is whether there were specific and articulable facts to justify the traffic stop of the defendant by the police on or about October 3, 2002. Upon our review of the record and the parties' briefs, we affirm the judgment of the Hamilton County Criminal Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which NORMA McGEE OGLE and ALAN E. GLENN, JJ., joined.

Bryan H. Hoss, Chattanooga, Tennessee, for the appellant, Bobbie Gene Gothard.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; William H. Cox, District Attorney General; and Bret Alexander, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

The defendant was indicted by the Hamilton County Grand Jury for driving under the influence, a Class A misdemeanor. The defendant filed a motion to suppress evidence obtained during the investigatory stop of his vehicle alleging that the officer did not have reasonable suspicion based on specific and articulable facts to justify the stop. The trial court conducted a hearing on the motion to suppress from which we summarize the following testimony.

Officer Mark Miller with the Hamilton County Sheriff's Department testified that he conducted a traffic stop of the defendant's vehicle on October 3, 2003. Officer Miller was parked at the Hamilton County EMS station catching up on his paperwork when he noticed the defendant's vehicle leaving Couch's nightclub across the street. The defendant caught Officer Miller's attention because

> [w]hen he pulled out, he crossed four lanes of highway, turned sort of heading northbound, but when he did, he ran across the outside white line and his whole vehicle almost, with the exception of the left driver's side tires, crossed the outside white line onto the shoulder of the road. Whenever he tried to straighten the vehicle up, he ran across the center line, and at that point in time . . . I suspected he was possibly under the influence of alcohol.

Officer Miller pulled out to catch up to the defendant and he observed the defendant cross the center white line another time. Officer Miller then turned on his video camera and noticed the defendant cross the outside white line a couple more times. Officer Miller stated that the defendant had crossed the white line approximately three times before he turned on his video camera.

Officer Miller testified that the defendant's initial turn onto the highway from the club was not a proper turn. Officer Miller recalled that the defendant "crossed the white line completely across the lane into the shoulder of the road." Officer Miller also recalled that after he activated his blue lights, the defendant turned into a gas station parking lot inappropriately using the shoulder as the turn lane. Officer Miller stated that it did not take him long to catch up to the defendant because the defendant was traveling under the speed limit.

The trial court noted that Officer Miller already had his blue lights activated when the defendant used the shoulder of the road as a turn lane and could have been pulling over onto the side of the road and then decided to turn into the gas station instead. The trial court also noted that the videotape showed the defendant cross the outside white line onto the shoulder twice.

On cross-examination, Officer Miller stated that the distance from the EMS station where he first observed the defendant to the spot where the defendant was ultimately pulled over was close to one mile. The speed limit on that highway is 55 miles per hour. Officer Miller videotaped the defendant for approximately one minute and twenty-five seconds.

Officer Miller testified that he was at the EMS station working on paperwork not watching traffic. Officer Miller explained, however, if someone caught his attention he would observe them. Officer Miller recalled that when the defendant pulled out of the club, he drove his car "onto the shoulder of the road, began straightening up [and] ran across the center line, back into the right side out lane and then almost immediately across the white center line." Officer Miller stated that he did not activate his blue lights when the defendant pulled out because he wanted to observe the defendant to make sure he was impaired and not simply making a driving mistake. Officer Miller stated that the defendant's driving did not get better, but instead was consistently questionable.

Officer Miller again testified that the defendant crossed the white line at least three times before he turned the camera on, the three times occurring almost immediately upon his seeing the defendant. While watching the videotape, Officer Miller pointed out two instances where the defendant crossed the white line. When asked whether he would agree that the video showed that the defendant's tires touched the white line but did not cross over into the emergency lane, Officer Miller replied, "No, [the defendant's tires] crossed across the fog line, the white line." Officer Miller said that there was very light traffic on the road at the time.

The defendant testified that he frequents the flea market near Couch's nightclub and he always pulls out into the far lane of the highway when he leaves because there are a lot of accidents in the area. The defendant admitted that on the night in question he pulled out farther than he normally did and probably did cross the outside line. From what he saw on the video, the defendant agreed that while he was driving down the road he did touch the line but he did not think he crossed it completely. The defendant said that he did not think he crossed the white line three other times as Officer Miller had just testified.

On cross-examination, the defendant testified that he regularly drives on the outside white line. He acknowledged that it was not unusual for him to touch the white line and cross it occasionally. The defendant said that he had a friend in the car with him that night and they were having a conversation so that could explain why he touched the white line. The defendant admitted that because he had a tendency to drive on the white line he could have crossed it once or twice, but not three times.

The trial court denied the defendant's motion to suppress, stating as follows:

> It's an articulable suspicion the officer gave is the reason he stopped him.
>
> As I say, really it's safer for [the defendant] to cross over into . . . the shoulder of the road [when entering the highway]. That line marks the shoulder, the fog line marks the shoulder of the road. So in that case, barely going over probably was safer, but the articulable suspicion that gave . . . the officer a reason to suspect that [the defendant] was under the influence, because he had crossed over a total of five times, according to the officer. I observed two [on the video] and the officer said he observed five.

The defendant subsequently entered a guilty plea to driving under the influence ("DUI") in exchange for a sentence of eleven months, twenty-nine days probation following service of forty-eight hours in the workhouse. As part of his plea, the defendant reserved the certified question of law of "whether there were specific [and] articulable facts to justify the traffic stop of the defendant by the police on or about 10-3-03?" As noted in the final judgment, the parties consented to the reservation of the certified question, agreed that it was dispositive of the case, and clearly identified the scope of the legal issue reserved.

II. ANALYSIS

Tennessee Rule of Criminal Procedure 37 permits a criminal defendant to plead guilty and appeal a certified question of law if the defendant has entered into a plea agreement under Rule 11(e) and has "explicitly reserved with the consent of the state and of the [trial] court the right to appeal a certified question of law that is dispositive of the case . . . ." Tenn. R. Crim. P. 37(b)(2)(i); *see also State v. Armstrong*, 126 S.W.3d 908, 910 (Tenn. 2003). The rule also requires that the following conditions be met:

> (A) The judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by defendant for appellate review;
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> (B) The question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
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> (C) The judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and
>
> (D) the judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case[.]

Tenn. R. Crim. P. 37(b)(2)(i); *see also State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). The record in the instant case indicates that the defendant's certified question is properly before this court.

In reviewing a trial court's denial of a motion to suppress, the appellate standard of review for a trial court's conclusions of law and application of law to facts is a de novo review. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Notably, however, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001) (citations omitted).

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Therefore, a search or seizure conducted without a warrant is presumed unreasonable and any evidence discovered subject to suppression. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, the evidence will not be suppressed if the state proves that

the warrantless search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

One of these narrow exceptions occurs when a police officer initiates an investigatory stop based upon specific and articulable facts that the defendant has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In determining whether reasonable suspicion existed for the stop, a court must consider the totality of the circumstances. *Binette*, 33 S.W.3d at 218. Reasonable suspicion for an investigatory stop will be found to exist only when the events which preceded the stop would cause an objectively reasonable police officer to suspect criminal activity on the part of the individual stopped. *State v. Levitt*, 73 S.W.3d 159, 172 (Tenn. Crim. App. 2001); *State v. Norword*, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

The defendant relies on three cases, *State v. Ann Elizabeth Martin*, E1999-01361-CCA-R3-CD, 2000 WL 1273889 (Tenn. Crim. App., at Knoxville, Sept. 8, 2000), *United States v. Freeman*, 209 F.3d 464 (6th Cir. 2000), and *State v. Binette*, 33 S.W.3d 215 (Tenn. 2000), to argue that Officer Miller did not have reasonable suspicion to initiate an investigatory stop of his vehicle. In *Martin*, the defendant briefly crossed into a turn lane and then exited the turn lane and resumed travel. The panel of this court in *Martin* noted that a motorist was liable to change his mind, therefore, it was not unusual for a vehicle to enter a turn lane and return to the travel lane without making a turn. *Martin*, 2000 WL 1273889, at *6. The *Martin* court also noted that it was not a traffic violation for a driver to momentarily drift out of the lane of travel. *Id.*

In *Freeman*, the Sixth Circuit addressed a situation where a large motor home partially entered into the emergency lane of a heavily traveled interstate road for several feet. The court concluded that the officer's observation of the motor home briefly entering the emergency lane was insufficient to give rise to probable cause that a traffic violation had occurred or that the driver was intoxicated. *Freeman*, 209 F.3d at 466.

In *Binette*, the Tennessee Supreme Court determined that an investigatory stop was illegal when the videotape showed no pronounced weaving or hard swerving by the defendant who was driving along a winding road. 33 S.W.3d at 219. Apparently the video in *Binette*, consisting of more footage than the tape at hand, showed the defendant touch the center line of his own lane twice but never violate a traffic law. *Id.*

In this case, the evidence at the suppression hearing reflects that Officer Miller noticed the defendant's vehicle and he suspected that the defendant was driving under the influence due to the manner in which he pulled onto the highway. Almost immediately, Officer Miller saw the defendant cross the white line three times. Officer Miller then turned on his video camera to record the defendant and the tape showed the defendant cross the line onto the shoulder of the road twice.

The defendant admitted that he crossed the white line onto the shoulder when he entered the highway. The defendant also admitted that he could have crossed the line one or two other times in addition to the times shown on the video because he tended to drive on the line, but he denied that he crossed the line as many times as Officer Miller testified. The defendant claimed that he was having a conversation with a friend and suggested that might have been why he touched the white line.

It is our view that the facts of this case are distinguishable from the facts of the cases offered by the defendant in support of his argument. Here, it appears that the highway was relatively straight, rather than a winding road, and there is no indication that the defendant's weaving was the result of any indecision regarding whether to make a turn. The defendant's crossing over the white line was also not a single isolated incident on a heavily traveled road, but instead a recurrent crossing on a road with very light traffic.

The trial court heard the testimony and evaluated the credibility of the witnesses. By its decision, the trial court accredited the testimony of Officer Miller that he saw the defendant cross the white line a total of five times, two of which were visible on the videotape. While we are aware that imperfect driving is not a crime, the defendant's driving here amounted to "more than mere imperfection[] in driving or inattention to detail." *State v. Gary S. Greve*, No. E2002-00999-CCA-R3-CD, 2003 WL 1562085, at *3 (Tenn. Crim. App., at Knoxville, Mar. 27, 2003). Even determining that it was not improper for the defendant to pull into the far lane upon initially entering the highway, the defendant's actions in crossing over the white line five times while traveling such a short distance were sufficient to give Officer Miller reasonable suspicion to suspect that the defendant was operating his vehicle while under the influence of alcohol.

III. CONCLUSION

Considering the totality of the circumstances, the evidence supports the trial court's determination that Officer Miller had reasonable suspicion based on specific and articulable facts to justify an investigatory stop of the defendant's vehicle. Accordingly, the trial court properly denied the defendant's motion to suppress.

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J.C. McLIN, JUDGE